IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3284 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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EXECUTIVE ENGINEER

Versus

MAKWANA DHIRAJLAL DAHYALAL

Appearance:

1. Special Civil Application No. 3284 of 2000

MR RC JANI for Petitioner No. 1

MR CB DASTOOR for Respondent No. 1

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 05/04/2002

ORAL JUDGEMENT

Heard learned advocate Mr.R.C.Jani for the petitioner and Mr.C.B. Dastoor for the respondent workman. By way of this petition, the petitioner has challenged the award made by the labour court, Junagadh

in Reference (LCJ) No. 241 of 1993 dated 22nd October, 1999 wherein the labour court has granted reinstatement in favour of the workman concerned while setting aside the order of termination and has granted full back wages for the intervening period with effect from 1st January, 1993. This petition was admitted by this court by issuing rule thereon on 26th July, 2000 and interim relief has been granted against the implementation of the award in question.

During the course of hearing, learned advocate Mr.Jani has raised a contention that the petitioner is not an 'industry' as defined under section 2(j) of the Industrial Disputes Act, 1947. He has also submitted that the respondent has not completed 240 days continuous service within 12 months preceding the date of alleged termination as required under section 25-B of the Industrial Disputes Act,1947 and, therefore, the respondent workman was not entitled for the benefits under section 25-F of the Act. He has submitted that the petitioner is a public body and the reference has remained pending before the labour court for about seven years or so and therefore, the back wages ought not to have been granted for such a long period. According to the respondent, the date of termination is of December, 1988. Therefore, according to Mr. Jani, since the dispute was raised after about five years and as such, there was delay in raising the industrial dispute and, therefore, on that ground, the labour court ought to have rejected the reference. Learned advocate Mr.Jani has also submitted that the services of the respondent were not terminated by the petitioner and he had abandoned the service and has not reported at the place of transfer, at Veraval because he was not willing to join at Veraval and that is how, he abandoned the job at his own, however, this aspect has not been considered by the labour court while passing the award in question. He has also submitted that the respondent was appointed temporarily and was not appointed on permanent basis. In support of his submissions, he has relied upon the following decisions;

(1) Negungadi Bank Ltd. v. K.P. Madhavankutty and others, reported in 2000 Lab. I.C. page 703
(2) Ambalal S. Kumbhare and Anr. v. Gujarat Coop. Marketing Federation Ltd., reported in 2000(1) GLH 69
(3) GSRTC v. MS Patel & Anr., reported in 1998 (1) GLH page 369
(4) Premibhai L. Gamit v. Executive Engineer, reported in 1998 (3) GLR page 2550.

(5) Shankerji Chelaji Thakore versus State of Gujarat reported in 2000(1) GLH page 482.

(6) Executive Engineer Una Irrigation Project versus Rajiben Parbatbhai reported in 1997 (1) GLH 750

On the other hand, learned advocate Mr. Dastoor has submitted that the dispute was belatedly raised and there was some delay in raising the dispute and the labour court has, while granting relief of reinstatement as well as back wages, taken into consideration this aspect of delay and has granted relief of backwages from the date of reference and not from the date of termination. He has further submitted that the petitioner has filed the written statement before the labour court and, thereafter, no oral evidence has been led by the petitioner before the labour court. According to him, the petitioner has produced list of documents at Exh.10 which documents were exhibited as Exh. 11 to 14 and oral evidence of the petitioner has been closed by the labour court and, thereafter, written arguments were made by the learned advocates before the labour court. He has further submitted that mere raising of contention in the written statement is not sufficient but it is necessary to press such contention into service before the labour court and to led proper evidence for substantiate such contention and if no evidence has been led in support of such contention and if such contention has not been proved before the labour court, then, the labour court is not duty bound to consider such averments raised in the written statement. He has submitted that the averments made in the written statement cannot be considered to be evidence of the petitioner and, therefore, if the petitioner has raised such contention that it is not an industry as defined under the Industrial Disputes Act, 1947, then, the petitioner is required to prove such contention by leading evidence to that effect for substantiating such contention. Mr. Dastoor has relied upon the decision in case of Bangalore Water Supply Sewerage Board versus A. Rajappa and others reported in AIR 1978 SC 548. Said decision was referred to by Hon'ble Ms. Justice Sujata Manohar and thereafter the matter was placed before the Chief Justice of India and ultimately the apex court has taken view in case reported in 2000 (1) SCC 224 between Coir Board Ernakulam Kerala State and others versus Indiradevi P.S. and others that the case does not require reconsideration on reference made by Two Judge Bench of the court in 1998 (3) SCC 259. It is necessary and important to be noted that here also, the petitioner is Gujarat Water Supply and Sewerage Board and before the apex court also, Sewerage Board was the party wherein the decision has

been given by the apex court and it has been held that the Board is an industry within the meaning of section 2(j) of the Act and, therefore, in view of that, there is no necessity to go any further into this aspect. and the activities of the petitioner must be held as an industry as has been held by the apex court. Mr. Dastoor has further submitted that the respondents have completed 240 days and in absence of evidence, the view taken by the labour court is quite just, proper and valid and the same does not require any interference by this court.

Considering the contention raised by Mr. Jani that the petitioner Board is not covered by the definition under section 2(j) of the Industrial Disputes Act, 1947, this Court has examined the award in question. In respect of the said contention, the petitioner board has filed reply before the labour court vide Exh. 8 raising such contention and thereafter, vide Exh. 4, four documents were produced by the petitioner before the labour court. Then, vide Exh. 15, the workman concerned was examined before the labour court. Thereafter, the petitioner board has not led any oral evidence before the labour court to substantiate the contention that the petitioner board is not an industry as defined under section 2(j) of the Act. Mere contention raised in its written statement is not enough. Same is required to be proved by producing and leading proper evidence before the labour court. Here, it is not in dispute that the petitioner has not led any oral evidence for substantiating such contention that it is not an industry as defined under section 2(j) of the I.D> Act, 1947. In view of this factual position, it cannot be said that the labour court has committed any error in coming to the conclusion that the petitioner board is an industry within the meaning of section 2(j) of the I.D. Act, 1947. Apart from that, it is also necessary to note that the petitioner is the Gujarat Water Supply and Sewerage Board. Larger Bench of the Apex Court has examined the very same contention as to whether the Sewerage Board is an industry within the meaning of section 2(j) of the I.D. Act or not and has answered that the Board is an industry within the meaning of section 2(j) of the I.D. Act. Mere contention raised in its written statement cannot be considered to be legal evidence. Each and every contention raised in the written statement are required to be proved by producing or by leading proper evidence which has not been done by the petitioner board before the labour court and therefore, the labour court has rightly decided that the petitioner board is covered by the definition of industry under section 2(j) of the I.D. Act, 1947. At this stage, relevant observations

made in para 18 by the apex court in case of Bangalore Water Supply and Sewerage Board v. A. Rajappa and Others, reported in AIR 1978 SC 548 are reproduced as under:

> "18. I would also like to make a few observations about the so called 'sovereign' functions which have been placed out side the field of industry. I do not feel happy about the use of the term 'sovereign' here. I think that the term 'sovereign' should be reversed technically and more correctly, for the sphere of ultimate decisions. Sovereignty operates on a sovereign plane of its own as I suggested in Karnataka Bharati's case, AIR 1973 SC 1461, supported by a quotation from Ernest Barker's "Social and Political Theory". Again, the term "Regal" from which the term "sovereign" functions appears to be deprived, seems to be a misfit in a Republic where the citizen shares the political sovereignty in which he has even a legal share however small in as much as he exercises the right to vote. What is meant by the use of the term 'sovereign' , in relation to the activities of the State, is more accurately brought out by using the term 'governmental' functions although there are difficulties here also in as much as the Government has entered largely now fields of industry. Therefore, only those services which are governed by separate rules and constitutional provisions, such as Article 310 and 311 should, strictly speaking, be excluded from the sphere of industry by necessary implication. "

In para 74 of the said decision, the apex court has observed as under:

> "74. Although we are not concerned in this case with those categories of employees who particularly come under departments charged with the responsibility for essential constitutional functions of government, it is appropriate to state that if there are industrial units severable from the essential functions and possess an entity of their own it may be plausible to hold that the employees of those units are workmen and those undertakings are industries. A blanket exclusion of every one of the host of employees engaged by government in departments falling under the general rubrics like justice, defence, taxation, legislature may

not necessarily be thrown out of the umbrella of the Act. We say no more except to observe that closer exploration, and summary rejection is necessary."

Subsequently, the apex court has again considered the case of Bangalore Water Supply in connection with what is the sovereign function of the State. This aspect has been examined by the apex court in case of Chief Conservator of Forests versus J.M. Kondhare, reported in AIR 1996 SC 2898. Relevant observations made in para 7 are reproduced as under:

"7. As per the Bangalore Water Supply case (AIR 1978 SC 548), sovereign functions' strictly understood' alone qualify for exemption and not the welfare activities or economic adventures under taken by the Government. This is not all. A rider has been added that even in the departments discharging sovereign functions, if there are units which are industries and they are substantially severable, then, they can be considered to be an industry. As to which activities of the Government could be called sovereign functions strictly understood has not been spelt out in the aforesaid case. "

In para 12 and 13 of the said decision, it has been observed by the apex court as under:

"12. We may not go by the labels, Let us reach the hub. And the same is that the dichotomy of sovereign and non-soverign functions does not really exist, it would all depend on the nature of power and manner of its exercise, as observed in para 23 of NAGENDRA RAO'S CASE [1994 AIR SCW 3753]. As per the decision in this case, one of the tests to determine whether the executive function is sovereign in nature is to find out whether the State is answerable for such action in Courts of law. It was stated by Sahai, J. that acts like defence of the country, raising armed forces and maintaining it, making peace or war, foreign, affairs, power to acquire and retain territory, are functions which are indicative or external sovereignty and are political in nature. They are, therefore, not amenable to the jurisdiction of ordinary civil court inasmuch as the State if immune from being used in such matters. But then, according to this decision the immunity ends there. It was

then observed that in a welfare State, functions of the State are not only the defence of the country or administration of justice or maintaining law and order but extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. Because of this the demarcating line between sovereign and non sovereign powers has largely disappeared.

13. The aforesaid shows that if we were to extend the concept of sovereign function to include all welfare activities as contemplated on behalf of the appellants, the ratio in Bangalore Water Supply case (AIR 1978 SC 548) would get eroded, and substantially. We would demur to do so on the face what was stated in the aforesaid case according to which except the strictly understood sovereign function, welfare activities of the State would come within the purview of the definition of industry, and, not only this, even within the wider circle of sovereign function, there may be an inner circle encompassing some units which could be considered as industry if substantially severable. "

Recently, this question has again been examined by the Patna High Court whether the Water Resources Department is an industry or not. In case of State of Bihar and others versus Presiding Officer and others reported in 2002 II LLJ 233, the Patna High court has observed as under in para 3 of the said decision:

"3. The State has come to this Court inter alia pleading that the Water Resources Department concerned was not an industry under the provisions of the Industrial Disputes Act,1947 and as the Division Bench judgment of this Court has clearly observed that the said department of the State is not an industry, the labour court was not justified in making an Award in favour of the workmen. The second plank of the argument is that the workmen were in fact not workmen and their initial appointments were illegal, therefore also, the Labour Court was not justified in making the award in favour of the workmen."

In para 6 of the said judgment, the Patna High Court has observed as under while rejecting the

submission made by the learned counsel for the State:

> "6. The Supreme Court in the matter of Coir Board, Ernakulam Kerala State and another v. Indira Devi P.S. and others, 2000 (1) SCC 224 : 1999-I-LLJ-1109 has held that the Judgment in the matter of Bangalore Water Supply and Sewerage Board, v. A. Rajappa AIR 1978 SC 969 : 1978 (1) SCC 213 : 1978 I LLJ 349, was holding the field and further observed that the Judgment in the matter of Bangalore Water Supply did not need any reconsideration. The order was passed by the Supreme Court on a reference made by a seven Judge Bench of the Supreme Court. In the said matter of Bangalore Water Supply, the Supreme Court observed that the person employed with the Board was a workman. Applying the ratio of Bangalore Water Supply & Sewerage Board, I have no hesitation in holding that the Department in question in fact is an industry. The first submission made by the learned counsel for the State deserves to and is accordingly rejected."

Therefore, in view of the two decisions of the apex court and one of the Patna High Court, and also keeping in mind that such contention raised by the petitioner board before this court that it is not an industry has not been proved by the petitioner board before the labour court by producing material and evidence before the labour court, it cannot be said that the labour court has committed any error in coming to the conclusion that the petitioner board is covered by the definition under section 2(j) of the Industrial Disputes Act,1947 and it also cannot be said that the labour court has committed an error in holding that the petitioner is an industry within the meaning of section 2(j) of the I.D. Act. Therefore, the contention raised by Mr. Jani in that regard is rejected.

I have considered the submissions made by both the learned advocates and I have also considered the authorities cited by the learned advocates before this Court. Statement of claim was filed before the labour court by the workman at Exh.3 and it was pointed out that he joined in 1986 and continuously worked as such with the petitioner and his services were terminated in the month of December, 1988. Reply was submitted before the Labour Court at Exh. 8 and the respondent produced list Exh. 9 and produced four documents. Exh. 16 is the certificate issued by the Deputy Executive Engineer, Keshod in favour of the respondent. Petitioner has not

been disputing that such certificate has been issued by the Deputy Executive Engineer of the Petitioner Board. Thereafter, the petitioner has produced documentary evidence vide list Exh. 10 which documents have been exhibited as Exh. 11 to 14. Before the Labour Court, the respondent was examined at Exh. 15 and his oral evidence was cross examined by the petitioner and it is important to be noted that thereafter, no oral evidence has been led by the petitioner to substantiate its averments raised in the written statement and to rebut the contentions raised by the workman in its statement of claim and the oral evidence. Then, the Labour Court has examined the evidence on record produced by both the parties. The Labour Court first of all examined whether the respondent is a workman within the meaning of section 2(s) and petitioner is an industry within the meaning of section 2(j) of the I.D. Act,1947 or not and has then come to the conclusion that the respondent is a workman and the petitioner is an industry respectively within the meaning of section 2(s) and 2(j) of the Act. For coming to such conclusion, the labour court has appreciated the deposition of the workman at Exh. 15 wherein it was pointed out by the workman that he was appointed in the year 1986 and his services were terminated in 1988 and the certificate at Exh. 16 was issued by the petitioner and was produced on record by the petitioner which was not disputed and no evidence has been led against the said certificate and, therefore, the Labour Court has relied upon the said certificate. Then, the Labour Court has examined the question whether the respondent has completed 240 days or not. For appreciating this aspect, the labour court has considered the reply filed by the petitioner before it wherein the petitioner has nowhere stated as to for how many days the respondent has worked with the petitioner and no explanation has been given by the petitioner but considering the certificate Exh. 16, the labour court has specified the period of working days from 16th December, 1985 to 29th January, 1987 and the workman has in his deposition deposed for the period from 16th December, 1985 to December, 1988 but against that, no oral evidence has been led by the petitioner and, therefore, the labour court has come to the conclusion that the workman has completed 240 days' continuous service as required under section 25-B and 25-F of the Industrial Disputes Act, 1947 and the termination has been considered as retrenchment without following the mandate given under section 25-F of the I.D. Act, 1947 and in view of the noncompliance of mandate under section 25-F of the I.D. Act, 1947, order of termination against the workman was set aside by the labour court. Thereafter, the labour court has appreciated the

contention raised by the petitioner that the respondent workman has left the job at his own and has, thus, abandoned the work when the project has been transferred at Veraval and has considered the contention that the workman has not reported for duty at Veraval and for appreciating such contention, the labour court has examined whether the petitioner has issued any communication for such alleged misconduct of not reporting at Veraval or seeking his explanation for not reporting at Veraval and for want of evidence to that effect on record produced by the petitioner, the labour court has come to the conclusion that the petitioner has not proved that the respondent has left the job at his own volition when the project has been transferred at Veraval by observing that if the respondent was remaining absent and was not reporting at Veraval after the transfer of the project, then, for his remaining absent, no charge sheet has been issued and nothing has been produced on record to that effect and, therefore, the labour court has held that the contention has not been proved by the petitioner. The labour court has come to the conclusion that in view of the facts on record, the petitioner has not followed the provisions of section 25-F of the I.D. Act, 1947 and, therefore, the termination of service is bad and illegal and, therefore, the workman is entitled for reinstatement in service. Thereafter, the labour court has considered the question of back wages. For considering this question, the labour court has considered the evidence produced by the respondent on record has remained unchallenged and uncontroverted and has observed that in absence of evidence in respect of gainful employment, the workman is entitled for full back wages for the intervening period from the date of reference 28th January, 1993 and not from the date of termination. Thus, while considering the question of back wages, the labour court, taking into consideration delay in raising dispute and filing reference, has refrained itself from granting back wages from the date of termination but has granted such relief only from the date of filing of the reference.

During the course of hearing, learned advocate Mr.Jani appearing for the petitioner has raised the contention about delay in raising industrial dispute and has submitted that in view of the delay in raising industrial dispute, the labour court ought not to have adjudicated the dispute on merits and it ought to have rejected the reference on the ground of delay alone. For appreciating this contention, it is necessary to be considered that if the petitioner is having objection about delay in raising dispute, then, the petitioner

ought to have challenged the order of reference itself on the ground of delay which was made by the Assistant Commissioner of Labour before it. The second aspect is that mere contention about delay has been raised in its written statement before the labour court but no evidence to that effect has been produced. Mr. Jani has relied upon the decision to substantiate his contention that the reference ought to have been rejected on the ground of delay alone. However, it is a settled law that once the reference has been made to the labour court for adjudication of the dispute, then, the labour court has no power or authority to decide the legality, validity and propriety of the reference made to it. The labour court cannot examine the legality, validity and propriety of such reference as an appellate or higher forum over the decision taken by the authority. On the contrary, it is the duty of the labour court to adjudicate the dispute and to pass appropriate award. Under the Industrial Disputes Act, 1947, no limitation has been prescribed for raising of an industrial dispute and such dispute can be raised at any time since the section itself has been providing for that. This aspect has been examined by the apex court in case of Sapan Kumar Pandit versus UP State Electricity Board and others reported in (2001) 6 SCC 222, wherein the apex court has considered the limitation period for making of reference and held that it is co-extensive with the existence of dispute. As per the apex court in the said decision, the opinion as to the existence of the dispute has to be formed by the Government alone and none else. The apex court has also observed in the head note of the said decision that the government's decision to make a reference raises a presumption of the Government having formed such an opinion.

Relevant observations made by the apex court in case of Sapan Kumar Pandit v. UP State Electricity Board & Others, reported in 2001 (6) SCC page 222 in para 9, 14 and 15 are reproduced as under :

"9. Hence, the real test is, was the industrial dispute in existence on the date of reference for adjudication ? If the answer is in the negative, then the Government's power to make a reference would have extinguished. On the other hand, if the answer is in positive terms, the Government could have exercised the power whatever be the range of the period which elapsed since the inception of the dispute. That apart, a decision of the Government in this regard cannot be listed (sic) on the possibility of what

another party would think, whether any dispute existed or not. The section indicates that if in the opinion of the Government the dispute existed then the Government could make the reference. The only authority which can form such an opinion is the Government. If the Government decides to make the reference, there is a presumption that in the opinion of the Government, there existed such a dispute.

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14. It is useful to refer to a three Judge Bench decision of this court as it related to the scope of the very same provision i.e. section 4-K of the UP Act. In Western India Match Co. Ltd. v. Workers Union [(1970) 1 SCC 225 : AIR 1970 SC 1205] learned Judges made the following observations :(SCC p. 231, para 8)

'Therefore, the expression 'at any time', though seemingly without any limits, is governed by the context in which it appears. Ordinarily, the question of making a reference would arise after conciliation proceedings have been gone through and the Conciliation Officer has made a failure report. But the Government need not wait until such a procedure has been completed. In an urgent case, it can 'at any time', i.e. even when such proceedings have not begun or are still pending, decide to refer the dispute for adjudication. The expression 'at any time' thus takes in such cases as where the Government decides to make a reference without waiting for conciliation proceedings to begin or to be completed. As already stated, the expression 'at any time' in the context in which it is used postulates that a reference can only be made if an industrial dispute exists or is apprehended. No reference is contemplated by the section when the dispute is not an industrial dispute, or even if it is so, it no longer exists or is not apprehended, for instance, where it is already adjourned or in respect of which there is an agreement or a settlement between the parties or where the industry

in question is no longer in existence. '

15. There are cases in which lapse of time had caused fading or even eclipse the dispute.If anybody had kept the dispute alive during the long interval, it is reasonably possible to conclude in a particular case that the dispute ceased to exist after some time. But when the dispute remained alive though no galvanized by the workmen or the union on account of other justified reasons, it does not cause the dispute to wane into total eclipse. In this case, when the Government has chosen to refer the dispute for adjudication under section 4-K of the UP Act, the High Court should not have quashed the reference merely on the ground of delay. Of course, the long delay for making the adjudication could be considered by the adjudication authorities while moulding its reliefs. That is a different matter altogether.The High Court has obviously gone wrong in axing down the order of reference made by the Government for adjudication. Let the adjudicatory process reach its legal culmination."

In case of Ajaib Singh v. The Sirhind Co-operative Marketing cum Processing Service Society Ltd. and another reported in AIR 1999 SC 1531, the apex court has considered the issue of delay and has held that the reference can be made and the Limitation Act is not applicable to the provisions of the Industrial Disputes Act, 1947. In para 10 of the said decision, the apex court has observed as under:

"10. It follows, therefore, that the provisions of Article 137 of the Schedule to Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman only on the ground of delay. The plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a merely hypothetical defence. No reference to the labour court can be generally questioned on the ground of delay alone. Even in a case where the delay is shown to be existing, the tribunal, labour court or board dealing with the case can appropriately mould the relief by declining to grant back wages to the workman till the date he raised the demand regarding his

> illegal retrenchment/termination or dismissal. The court may also in appropriate cases direct the payment of part of the back wages instead of full back wages. Reliance of the learned Counsel for the respondent management on the full bench judgment of the Punjab and Haryana High Court in Ram Chander Morya v. State of Haryana (1999) 1 SCT 141 is also of no help to him. In that case, the High Court nowhere held that the provisions of Article 137 of the Limitation Act were applicable in the proceedings under the Act. The Court specifically held "neither any limitation has been provided nor any guidelines to determine as to what shall be the period of limitation in such cases". However, it went on further to say that 'reasonable time in the cases of labour for demand of reference or dispute by appropriate Government to Labour tribunals will be five years after which the Government can refuse to make a reference on the ground of delay and laches, if there is no explanation to the delay." We are of the opinion that the Punjab and Haryana High Court was not justified in prescribing the limitation for getting the reference made or an application under section 37-C of the Act to be adjudicated. It is not the function of the Court to prescribe the limitation where the Legislature in its wisdom had thought it fit not to prescribe any period. The courts admittedly interpret law and do not make laws. Personal views of the Judges presiding the Court cannot be stretched to authorize them to interpret law in such a manner which would amount to legislation intentionally left over by the Legislature. The judgment of the Full Bench of the Punjab and Haryana High Court has completely ignored the object of the Act and various pronouncements of this Court as noted hereinabove and thus is not a good law on the point of the applicability of the period of limitation for the purposes of invoking the jurisdiction of the Courts/boards and tribunal under the Act."

The apex court has considered one more aspect in case of Mahavirsing versus UP State Electricity Board reported in 1999-II CLR 7 where the apex court has considered the delay of nine years in raising of an industrial dispute and has held that merely on the ground of delay, dispute does not cease and the court can grant the relief by taking into consideration such delay.

Therefore, in view of the observations made by the apex court in the aforesaid decisions, the decision cited by Mr. Jani is not helpful to him and is not applicable in the facts and circumstances of this case. This question has already been settled by the apex court and, therefore, such contention cannot be accepted.

The next contention raised by Mr. Jani is that the workman has not completed 240 days continuous service. For coming to the conclusion that the workman has completed 240 days, the labour court has relied upon the certificate at Exh. 16 wherein the period has been specified, from which date and upto which date the workman had worked with the petitioner and the last date which was referred to in the certificate is 29th January, 1987 and the date of entry is referred to in the certificate as 16th December, 1985. If we calculate the working days as has been mentioned in the certificate from 16th January, 1986 to 29th January, 1987, 12 months preceding the date of termination, and if this certificate is considered to be true and correct as not challenged by the petitioner, then, actual working days would come to 278 days. Therefore, it is clear that the workman has completed 240 days service during the last 12 months preceding the date of termination and this has been proved by the workman beyond reasonable doubt on the basis of the document at Exh. 16 which was the certificate issued by the petitioner itself and, therefore, the labour court was right in holding that the workman has completed 240 days continuous service during last 12 months preceding the date of termination by relying upon the certificate Exh. 16 and in doing so, the labour court has not committed any error. In such situation, there is one more judgment of the apex court that if the case of the respondent workman is not rebutted by the employer, then, case of the workman must be believed and if the labour court has believed such case of the workman, then, it cannot be said that the labour court has committed any error. View to that effect has been taken by the apex court in case of M/s. Tannery and Footwear Corporation of India v. Raj Kumar and another reported in 2002 AIR SCW 44. Relevant observations made by the apex court in in para 3 of the said decision are reproduced as under :

"3. Learned counsel for the appellant submitted that the burden of proof lay upon the respondent to establish that he was in the employment of the appellant and had worked for a period of 240 days in a year before termination of his services and no such material was made

> available. It is clear that neither the respondent produced any material in support of the case nor to rebut the claim made by him any material was produced by the appellant. It is in these circumstances that the labour court came to the conclusion that on appreciation of the material on record such as Exhibit E.1 (Appointment letter) and Exhibit E.4 (the order of termination that the services of the respondent are not required from 20.7.1976) that the respondent had worked with the appellant for 240 days in a year. If that was the material on which the labour court placed reliance as no other material was placed by the appellant in rebuttal of the same, we think that the view taken by the labour court is in order. Therefore, the High Court was justified in not interfering with the award made by the Labour Court."

Therefore, in view of these facts and circumstances of the case, in view of the evidence on record not rebutted by the Board by producing any evidence to the contrary, the labour court is perfectly right in making the award in question and according to my opinion, it is a well reasoned order passed by the labour court. In respect of each and every contention raised by Mr. Jani during the course of hearing of this petition, Mr. Jani has cited the decisions referred to hereinabove. I myself have considered the decisions cited by Mr. Jani and according to my opinion, for the discussion to be made hereinafter, said decisions are not applicable in the facts and circumstances of this case. In view of these facts, the labour court has not committed any error in making the award in question.

In case of the Nedungadi Bank Ltd. v. K.P. Madhavankutty and others reported in 2000 Lab. IC 703, the matter was relating to reference and tenability thereof. A bank employee was dismissed from service after enquiry. Remedy of appeal was availed by the employee but unsuccessfully. Seven years thereafter, employee complaining of discrimination on the ground that two other dismissed employees were reinstated by bank but it has not been mentioned as to under what circumstances, they were dismissed and subsequently reinstated. In such facts of that case, it has been held by the apex court that the reference of such dispute was bad both on ground of delay and lack of industrial dispute existing or apprehended. In the said decision, the management bank

had challenged the reference by filing the writ petition. Here, in this case, it is not so. In this case, the Board has not challenged the validity of the reference itself and therefore, the law laid down in the said decision by the apex court is not applicable to the facts of the present case.

The head notes (A) in case of GSRTC vs. MS Patel & Anr. reported in 1998 (1) GLH page 369 are reproduced as under :

"Industrial Disputes Act, 1947 - Sec. 11-A

Whether the learned Judge of the Labour court was justified in interfering with the finding of guilt recorded by the departmental authority Held, the departmental authorities and administrative tribunals must be careful in evaluating such material and should not glibly swallow what is strictly speaking not relevant under the Evidence Act.

Head notes (B) are as under:

"Service Law - Penalty - Penalty to be

commensurate with the misconduct - When the workman has shown good performance, the order of dismissal was not called for - High Court can itself suitably modify the punishment instead of remitting the matter to the Tribunal."

In the facts of the case before hand, said decision is not helpful to the petitioner.

In case of Ambalal S. Kumbhar & Anr. v. Gujarat Coop. Marketing Federation, reported in 2000 (1) GLH 69, the observations made by the Division Bench of this Court in the head note are reproduced as under:

"Industrial Disputes Act, 1947-S.11A - A Labour

Court can under the statutory provision alter the punishment of discharge or dismissal to an appropriate of not reporting at the transferred place and of tampering of records is proved, no back wages could be awarded : In setting aside that part of the award, no error of law has been committed by the learned single Judge."

Upon consideration of the said judgment, according to my opinion, same is not relevant and applicable to the facts of the present case. Same is, therefore, not helpful to the petitioner.

In case of Premibhai L. Gamit v. Executive Engineer reported in 1998 (3) GLR 2550, the observations made by this court in head note are reproduced as under:

"Service Law - Permanent status - Constitution of India, 1950 - Arts. 14 and 16 - Industrial Disputes Act, 1947 (XIV of 1947) - Sec. 25F - Retrenchment - Ad hoc appointments on fixed term basis given by Government de hors the recruitment rules - Person so appointed cannot claim right to permanent status - Held further, when a fixed term appointment comes to an end by afflux of time, there is no question of compliance of Section 25F. "

In the case before hand, no such specific contention has been raised by the petitioner before the labour court and no evidence to that effect was led by the petitioner before the labour court. The labour court has relied upon the Certificate issued by the petitioner at Exh. 16 and then held that the termination was bad for want of compliance of section 25F of the ID Act. Before this Court also, the petitioner is not in a position to challenge the Certificate at Exh. 16 and, therefore, in view of such peculiar facts of the case before hand, the principles laid down in aforesaid decision are not applicable to the facts of the present case.

In case of Shankerji Chelaji Thakor versus State of Gujarat reported in 2000 (1) GLH 482, the observations made by the Division Bench of this Court in Head Note (B) and (C) are reproduced as under :

"(B) Industrial Disputes Act, 1947 - S. 25(B) - State of Gujarat passed Resolution dated 17.10.1988 - For benefit of pension, one must have worked at least for 240 days in each year for more than 10 years continuously as on 1.10.1988 - None of the petitioners appellants satisfy requirement of resolution - Petition held rightly rejected.

xxx

(C) Industrial Disputes Act, 1947 - S. 2(j) Industry - Function of public welfare of State is a sovereign function - Under this circumstances, State is not an 'industry'. "

In the case before hand, no such contention has been specifically raised by the petitioner before the

labour court and no evidence was led by the petitioner for proving such contention. Therefore, in view of the facts and circumstances of this case, this decision is not applicable and is not helpful to the petitioner.

The observations made by this Court in case of Executive Engineer, Una Irrigation Project Division versus Rajiben Parbatbhai reported in 1997 (1) GLH 750 in the head note are reproduced as under :

"Industrial Disputes Act, 1947 - Ss.25B, 25F
Termination of a daily wager - It is for the workman to prove, or it must be evident from record that he was in continuous service as per sub sec. (1) of S. 25B or that he actually worked for 240 days as per sub sec. (2) of S. 25B - Labour Court must record a clear finding that the workman was in continuous service for one year under s. 25B in the period of twelve months immediately preceding the date of termination - In the absence of any such finding, the award for reinstatement and full back wages illegal."

In the instant case, the respondent workman has proved before the labour court on the basis of the certificate Exh. 16 that he worked for 240 days and such evidence produced by the respondent was not rebutted by the petitioner board. Therefore, the principles laid down by the Court in the aforesaid decision are not helpful to the petitioner.

This Court is having very limited powers and authority in a petition under Article 226/227 of the Constitution of India to interfere with the findings of fact recorded by the labour court and / or tribunal. Recently, the apex court has considered the scope of Article 226 and 227 of the Constitution of India in case of OUSEPH MATHAI AND OTHER V. M. ABDUL KHADIR reported in 2002 [1] SCC 319. The relevant observations in para 4 & 5 are quoted as under :-

"4. It is not denied that the powers conferred upon the High Court under Articles 226 and 227 of the Constitution are extraordinary and discretionary powers as distinguished from ordinary statutory powers. No doubt Article 227 confers a right of superintendence over all courts and tribunals throughout the territories in relation to which it exercises the jurisdiction but no corresponding right is

conferred upon a litigant to invoke the jurisdiction under the said article as a matter of right. In fact power under this article casts a duty upon the High Court to keep the inferior courts and tribunals within the limits of their authority and that they do not cross the limits, ensuring the performance of duties by such courts and tribunals in accordance with law conferring powers within the ambit of the enactments creating such courts and tribunals. Only wrong decisions may not be a ground for the exercise of jurisdiction under this article unless the wrong is referable to grave dereliction of duty and flagrant abuse of power by the subordinate courts and tribunals resulting in grave injustice to any party.

5. In Warayam Singh v. Amarnath this Court held that power of superintendence conferred by Article 227 is to be exercised more sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority and not for correcting mere errors. This position of law was reiterated in Nagendra Nath Bora v. Commr. of Hills Division & Appeals. In Babhutmal Raichand Oswal v. Laxmibai T. Tarte this Court held that the High Court could not, in the guise of exercising its jurisdiction under Article 227 convert itself into a court of appeal when the legislature has not conferred a right of appeal. After referring to the judgment of Lord Denning in R. V. Northumberland Compensation Appeal Tribunal, ex p Shaw [All ER at p.128] This Court in Chadavarkar Sita Ratna Rao v. Ashalata S. Guram held : [SCC pg.460, para 20]

"20. It is true that in exercise of jurisdiction under Article 227 of the Constitution the High Court could go into the question of facts or look into the evidence if justice so requires it, if there is any misdirection in law or a view of the fact taken in the teeth of preponderance of evidence. But the High Court should decline to exercise its jurisdiction under Articles 226 and 227 of the Constitution look into the fact in the absence of clear and cut down reasons where the question depends upon the appreciation of evidence. The High Court also should not interfere with a findings are perverse and not based on any

material evidence or it resulted in manifest injustice [see Trimbak Gangadhar Telang]. Except to the limited extent indicated above, the High Court has no jurisdiction. In our opinion therefore, in the facts and circumstances of this case on the question that the High Court has sought to interfere, it is manifest that the High Court has gone into questions which depended upon appreciation of evidence and indeed the very fact that the learned trial Judge came to one conclusion and the Appellate Bench came to another conclusion is indiction of the position that two views were possible in this case. In preferring one view to another of factual appreciation of evidence, the High Court transgressed its limit of jurisdiction under Article 227 of the Constitution. On the first point, therefore, the High Court was in error."

The apex court has also considered the scope for interference in a petition under Article 226 and 227 of the Constitution in case of ROSHAN DEEN VS. PREETILAL reported in [2002] 1 SCC Pg.100. Relevant observations in para-12 are quoted as under :-

"12. We are greatly disturbed by the insensitivity reflected in the impugned judgment rendered by the learned Single Judge in a case where judicial mind would be tempted to utilize all possible legal measure to impart justice to a man mutilated so outrageously by his cruel destiny. The High Court non suited him in exercise of a supervisory and extraordinary jurisdiction envisaged under Article 227 of the Constitution. Time and again this Court has reminded that the power conferred on the High Court under Article 226 and 227 of the Constitution is to advance justice and not to thwart it [vide State of U.P. v. District Judge, Unnao]. The very purpose of such constitutional powers being conferred on the High Courts is that no man should be subjected to injustice by violating the law. The look out of the High Court is, therefore, not merely to pick out any error of law through an academic angle but to see whether injustice has resulted on account of any erroneous interpretation of law. If justice became the by-product of an erroneous view of law the High Court is not expected to erase such justice in the name of correcting the error of law."

Mr. Jani, learned advocate for the petitioner has not been able to point out any infirmity in the impugned award. He has also not been able to point out any jurisdictional error and/or procedural irregularity committed by the labour court while passing the award in question. Therefore, in view of the above, there is no substance in this petition and the same is, therefore, rejected. Rule is discharged. Ad.interim relief, if any, shall stand vacated with no order as to costs.

Dt.5.4.2002. (H.K. Rathod,J.)

Vyas